
Towards a Legal Framework for a Single National Ballast Water Management Scheme in Australia



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Introduction

Introduced Marine Pests (IMPs) pose a serious threat to marine biodiversity in Australia. There are many ways pests are introduced into the marine environment. The major vectors for IMPs are ballast water, ship fouling, accidental introductions due to mariculture and deliberate introduction.¹ The focus of this paper is on the administrative and legislative response to the introduction of IMPs through ballast water. Historically, ballast water accounts for only 15-20 per cent of the invasive marine species found in Australia. Ballast water is, however, becoming the major threatening vector in the last two decades.² The current ballast water legislative and administrative framework in Australia contains a number of gaps and overlaps because both the Commonwealth and the States and the Northern Territory have implemented their own regime to deal with the problem of IMPs in ballast water.

This article analyzes the effectiveness and scope of the current Commonwealth and State/Territory legislative and administrative regimes designed to prevent the introduction of introduced marine pests through ballast water in Australian waters. The paper examines the Constitutional framework that grants power to the Commonwealth and the States/Territory to regulate the marine environment and ballast water. The article concludes that the current ballast water framework is inadequate to deal with the increasing threat posed to Australia's marine environment by marine pests introduced

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¹ Development of a Regional Risk Management Framework for APEC Economies for the Use in the Control and Prevention of Introduced Marine Pests, APEC Working Document Group B, Centre for Research on Introduced Marine Pests.

² Ibid.

by ballast water. A national ballast water management scheme needs to be developed in the longer term to provide and maintain a consistent standard for ballast water management throughout Australia.

Background

Introduced marine pests (IMPs) are organisms introduced into the marine environment by human activity and have a significant impact on the marine environment. International shipping simultaneously offers transport opportunities for invasive marine pests via hull fouling, sea chests and ballast. These pests affect both biodiversity, and marine industries in Australia. Areas that can be detrimentally affected by these pests include fisheries and aquaculture production, human health, shipping and ports, tourism, coastal amenity, and species and ecosystem health and diversity.³ Negative impacts may include increased and unsustainable predation of, or competition with native species, genetic modifications to native populations, and physical environmental alterations such as eutrophication. The International Maritime Organisation (IMO) has identified the introduction of invasive marine species into new environments by ship's ballast water and other vectors as one of the four greatest threats to the world's oceans.⁴

Since the 1970s the rate at which foreign organisms are establishing in ports worldwide has increased dramatically. This is because transit speeds have increased, ballast water has become cleaner, and environmental management of ports has improved water quality, which means that marine organisms are increasingly surviving, rather than dying in transit. There are 210 known introduced marine species in Australia and on average 1 in 6 become marine pests.⁵

In response to the threats posed by IMPs, the United Nations conference on the Environment and Development (UNCED), held in Rio de Janeiro in 1992, in its Agenda 21 called on the IMO and other international bodies to take action to address the transfer of IMPs.⁶ In 1997 the IMO assembly adopted voluntary guidelines for the control and management of ships' ballast water, to minimise the transfer of harmful aquatic organisms and pathogens. The objective of the guidelines is to assist Governments and appropriate authorities to minimize the risk of introducing harmful aquatic organisms and pathogens from ships' ballast water and associated sediment while protecting ship safety.⁷ The main aspects of the guidelines worthy of note include requirements that:

- The State provide training and education of ships' masters and crew, including instructions on the application of ballast water and sediment management and treatment procedures, based upon information contained in the guidelines (Guideline 6.1);

³ Joint SCC/SCFA National Taskforce on the Prevention and Management of Marine Pest Incursions, Report of the Taskforce, December 1999.

⁴ <http://globallast.imo.org>. The other three threats are land-based sources of marine pollution, over-exploitation of living marine resources and physical alteration/destruction of marine habitat.

⁵ Development of a Regional Risk Management Framework for APEC Economies for the Use in the Control and Prevention of Introduced Marine Pests, Centre for Research on Introduced Marine Pests.

⁶ Agenda 21 s17.30 "States, acting individually, bilaterally, regionally or multilaterally and within the framework of IMO and other relevant international organisations, whether subregional, regional or global, as appropriate, should assess the need for additional measures to address degradation of the marine environment: (a) from shipping by: (vi) considering the adoption of appropriate rules on ballast water discharge to prevent the spread of non-indigenous organisms."

⁷ Art 4.1 Guidelines for the Control and Management of Ships' Ballast Water to Minimize the Transfer of Harmful Aquatic Organisms and Pathogens (Ballast Water Guidelines)

- Every ship that carries ballast water should be provided with a ballast water management plan to assist in the minimization of transfer of harmful aquatic organisms and pathogens. The intent of the plan should be to provide safe and effective procedures for ballast water management (Guideline 7.1.1);
- Port states should make available reception and treatment facilities for the environmentally safe disposal of ballast tank sediments (Guideline 7.2.1);
- When loading ballast, every effort should be made to avoid the uptake of potentially harmful aquatic organisms, pathogens and sediment that may contain such organisms by avoiding areas of known outbreaks, shallow water and ballasting at night. Ballast tanks should be cleaned and sediment removed regularly (Guideline 9.1.1);
- Where practicable, routine cleaning of the ballast tank to remove sediments should be carried out in mid-ocean or under controlled arrangements in port or dry-dock, in accordance with the provisions of the ship's ballast water management plan (Guideline 9.1.2);
- If it is necessary to take on and discharge ballast water in the same port to facilitate safe cargo operations, care should be taken to avoid unnecessary discharge of ballast water that has been taken up in another port (Guideline 9.1.3);

The Guidelines are directed to Member States and can apply to all ships, however, a port State authority can determine the extent to which the Guidelines do apply (Guideline 3). This means that the application of the guidelines is neither universal nor consistent.

To address the inadequacies of the current framework, IMO members have drafted a mandatory international legal regime to regulate and control ballast water. The International Convention for the Control and Management of Ships' Ballast Water and Sediments is being developed for consideration and adoption by a diplomatic conference scheduled for late 2003.⁸ The objectives of the draft Convention are to prevent, minimise and ultimately eliminate the risk to the environment and human health arising from the transfer of harmful aquatic organisms and pathogens through the control and management of ships' ballast water and sediments (Art 1). The key aspects of the draft Convention may be summarised as follows:

- The Convention applies to ships that are either entitled to fly the flag of, or operate under the authority of the Party (Art 4). However, it does not apply to ships not designed or constructed to carry ballast water, ships that operate exclusively in waters under the jurisdiction of the Party or under the jurisdiction of another Party (with that Party's exemption) and war ships or navy auxiliary;
- It provides that the parties shall create a system for monitoring the compliance and effects of Ballast Water Management within their jurisdiction, including the maintenance of records and development of risk assessment (Art 7 (1)(b)); and
- It permits authorised officers to inspect the ships Ballast Water Management Book and/or sample the ships' ballast water (Art 10)

⁸ The International Convention for the Control and Management of Ships' Ballast Water and Sediments available at <http://globallast.imo.org/index.asp?page=mepc.htm&menu=true>

The Australian Perspective

The chances of marine species introduction are significant in Australia. Australia has about 60 000 km of coastline including offshore islands. It is also amongst the world's twelve most biologically diverse countries, with up to 80% of our southern and 10% of our northern marine species found only in Australia.⁹ As an ocean bounded country Australia relies heavily on maritime transport, with over 95% of its imports and exports carried by sea, which greatly increases the chances of marine pests being introduced. It is estimated that Australia imports 12 billion tonnes of ballast water annually, with a further 30 million tonnes moved around the Australian coastline through domestic shipping.¹⁰

The potential economic impact of IMPs is serious. A small-scale outbreak of black-striped mussel in Darwin in early 1999 cost more than \$2 million to control.¹¹ Significant economic damage could have resulted if this species had become established, endangering northern Australia's pearling industry which is worth about \$225 million in 1998.¹² Due to the concern generated by the considerable potential for IMP incursions in Australia, and this outbreak, a Joint National Taskforce on the Prevention and Management of Marine Pest Incursions was established. The Task Force reported to the Australian and New Zealand Environment and Conservation Council (ANZECC) and the Ministerial Council on Forestry, Fisheries and Aquaculture (MCFFA) in December 1999.

The Joint SCC/SCFA National Taskforce on the Prevention and Management of Marine Pest Incursions Report (SCC/SCFA Report) recommended the implementation of immediate and longer term options to address the problem. The immediate action recommended by the Report is the establishment of a credible national ready response capability within the existing statutory arrangements and resources. Such a system is to include:

- Agreed emergency administrative procedures in the event of an outbreak of an introduced marine pest, including clearly defined agency roles, responsibilities and legal powers;
- Early warning and prevention systems for a short list of introduced marine species that pose a major threat; and
- Interim cost-sharing arrangements.¹³

In the longer term, the SCC/SCFA Report recommended the establishment of a permanent and comprehensive national system for the prevention and management of introduced marine pests, including;

- Pre-border efforts to reduce the risk of importation of marine pests;
- Border and post-border (including translocation) control systems for ballast water, hull fouling and other vectors;
- Monitoring to detect new incursions or spread of existing introduced marine pests;
- Emergency response to incursions; and

⁹ Ibid.

¹⁰ <http://globallast.imo.org>

¹¹ <http://globallast.imo.org>

¹² <http://globallast.imo.org>

¹³ Joint SCC/SCFA National Taskforce on the Prevention and Management of Marine Pest Incursions, Report of the Taskforce, December 1999, Executive Summary.

- Mitigation /control of introduced marine pests already in Australia.¹⁴

One of the key cross-cutting issues identified in the SCC/SCFA Taskforce Report is that of the statutory framework. The report found that 'there are gaps and overlaps in legal powers to address marine pest incursions, including overlaps between Commonwealth and State/Northern Territory laws.' These gaps and overlaps stem from the fact that both the Commonwealth and the States and Territories have power to regulate both the marine environment and ballast water. This division of power occurs because although 97% of Australia's marine area is under Commonwealth Government jurisdiction, most introduced species occur in coastal areas, which are covered by the States and the Northern Territory. The power of the States over the coastal sea is enshrined in the Offshore Constitutional Settlement (OCS), which granted States legislative power over the coastal sea to a limit of three miles. The OCS, however, does not affect the Commonwealth's power to legislate in relation to the territorial sea. This power sharing arrangement has meant that the Commonwealth and State Governments have developed their own, often contradictory, regimes.¹⁵

The SCC/SCFA Taskforce Report argued that there is an urgent need to ensure that there are comprehensive legal powers in place to enable the full range of actions necessary to address marine pest outbreaks. Furthermore, the Report recommended that where there are overlaps between jurisdictions' legislation, clarification is required of which legal powers should be used preferentially.

The Report also identified the need for improved national coordination between jurisdictions, to minimise resultant losses to efficiency and effectiveness of response strategies and to ensure that there is in place sufficient statutory support for the carrying out of all related activities including, *inter alia*, the need for clear understanding of liability issues associated with government responses.¹⁶

Adequacy of Current Legislative and Administrative Framework for Ballast Water Management in Australia

Commonwealth Framework

The Commonwealth's efforts at addressing introduced marine pests have been specific and directed through the *Quarantine Act* 1908 (Cth) and its attendant Regulations. Changes were made in 2001 to respond to concerns raised in relation to introduced marine pests.¹⁷

The provisions are designed to obtain information from a ship's master, and then to permit, if required, inspection of the vessel, and the taking of action against it to reduce the risk of marine pests. The reporting provisions are found in regulations 10 and 22A of the *Quarantine Regulations* (Cth),¹⁸ as authorised under section 28 of the *Quarantine Act* 1908 (Cth). The Regulations provide for a detailed set of questions that must be

¹⁴ Ibid.

¹⁵ S Clegg, 'Who is to work the pump? The Legal and Constitutional Issues for an Australian Single National Management Regime for ballast water', Paper presented to the workshop on a single national management regime for ballast water, September 1999.

¹⁶ Joint SCC/SCFA National Taskforce on the Prevention and Management of Marine Pest Incursions, Report of the Taskforce, December 1999 Recommendation 3

¹⁷ Regulation No.154 of 2001 (Cth).

¹⁸ Regulation 10 of the *Quarantine Regulations* (2000) includes ballast water questions in a ship's pre-arrival report.

completed by the ship's master prior to arrival at an Australian port.¹⁹ Ships of greater than 25 metres in length are required to answer questions in respect of ballast water.²⁰ In addition, it is an offence if a master fails to take reasonable steps to ensure that his or her ship does not carry pests or disease.²¹ Inspections are authorised under sections 70 and 70AA of the *Quarantine Act* 1908 (Cth), and remedial action including cleaning the vessel, is authorised under section 78A of the Act.

The application of the new ballast water measures under the *Quarantine Regulations* 2000 is limited to "international shipping" or "international vessels".²² These terms are not used in the *Quarantine Act* or *Regulations*. However, the provisions of the *Quarantine Act* with reference to inspection of vessels provide understanding of the scope of the ballast water measures under the *Quarantine Act*. Under section 17 of the *Quarantine Act* 1908 (Cth) the following vessels shall be subject to quarantine:

- (a) Every overseas vessel until pratique has been granted or until it has been released from quarantine;
- (b) Every vessel (whether an Australian vessel, a Cocos Islands vessel or an overseas vessel) on board which any quarantinable disease or disease which there is reason to believe or suspect to be a quarantinable disease has broken out or been discovered (notwithstanding that pratique has been granted or that it has been released from quarantine); and
- (c) Every vessel which is ordered into quarantine by a quarantine officer.

Under the Interpretation section of the Act:

- "overseas vessel" means a vessel other than: (a) an Australian vessel; or (b) a Cocos Islands vessel and includes a vessel that is on a voyage from Australia to the Cocos Islands or from the Cocos Islands to Australia.
- "Australian vessel" means a vessel which does not voyage or ply to or from any place outside Australia.
- "Cocos Islands vessel" means a vessel which does not voyage or ply to or from any place outside the Cocos Islands.

These provisions limit the application of the *Quarantine Act* to vessels arriving in Australia on international voyages. Domestic vessels are only covered by the Act in the event there is a reasonable suspicion they are carrying a "quarantinable" disease. These restrictions mean that the *Quarantine Act* 1908 (Cth) is not presently suitable to provide the framework for a single national system of inspection and enforcement with respect to introduced marine pests.

In terms of administrative framework, the Australian Quarantine and Inspection Service (AQIS), an operating group within the Commonwealth Department of Agriculture, Fisheries and Forestry – Australia (AFFA), is the lead agency for the regulation of ballast water discharge from international vessels in Australian ports/waters. On 1 July 2001 AQIS introduced new mandatory ballast water management regulations for all vessels arriving in Australia from international waters.

¹⁹ Regulation 18 *Quarantine Regulations* 2000 (Cth).

²⁰ Regulation 10(1) *Quarantine Regulations* 2000 (Cth).

²¹ Regulation 22 *Quarantine Regulations* 2000 (Cth).

²² See Information Booklet produced by AQIS entitled: "Australian Ballast Water Management Requirements", p.2.

Under the new regulations all “international vessels” are required to manage their ballast water to the satisfaction of AQIS. Vessels carrying ballast water that has been assessed as ‘high risk’ will not be permitted to discharge that water in Australian ports/waters. All high-risk ballast intended for discharge during the visit to Australia must be subject to an approved management action. These currently include:

- non discharge of high risk ballast water;
- tank-to-tank transfer of high risk ballast water;
- full ballast water exchange at sea prior to arrival in Australian ports/waters using IMO approved standard procedures.

In the absence of an internationally recognised alternative, AQIS has indicated it will accept the IMO recommendation of a 95% change of water (3 times flow through each tank) as an acceptable treatment for ballast water. Vessels who seek to use an alternative treatment method are assessed on a case-by-case basis.²³

Under the new regulations all vessels are required to submit a revised Quarantine Pre Arrival Report (QPAR) for each voyage. The report includes detailed information on their ballast water management activities en-route to Australia and allows AQIS to make decisions on appropriate action as necessary. Under the legislation the QPAR must be submitted 12 to 48 hours prior to arrival at the first Australian port.²⁴

All “international vessels” arriving in Australia are subject to a quarantine inspection, which includes a ballast water verification. This verification check determines whether the vessel has undertaken appropriate ballast water management action during the current voyage. AQIS Seaports Program is fully cost recovered from industry and charges the vessel for each quarantine inspection.²⁵

The new mandatory requirements also include the use of a software package (the BWDSS) as a tool to assist international vessels travelling to Australia to determine if their ballast water is at risk. The BWDSS requires the Master or Agents of a vessel arriving in Australia to lodge certain information into the system prior to arrival in Australia. The BWDSS information includes vessel identification details (call sign, name, IMO number) and ballast water activity information for each ballast tank (uptake/discharge ports and locations, dates, time). The BWDSS provides a risk assessment on each tank delivered electronically to the vessel prior to arrival in Australia – this allows the Master to manage any high-risk ballast en-route. Vessels that have chosen to undertake a full exchange at sea are not required to use the BWDSS.²⁶

A supplementary piece of Commonwealth legislation that may be used to manage ballast water in Australia is the *Environment Protection and Biodiversity Act 1999* (EPBC Act). This Act prohibits a person from taking in a Commonwealth marine area an action that has, will have or is likely to have a significant impact on the environment. The Act further prohibits a person from taking outside a Commonwealth marine area (but inside the Australian jurisdiction) an action that has or will have a significant

²³ Australian Ballast Water Management Requirements, Department of Agriculture, Fisheries and Forestry Australia, available at www.aqis.gov.au/shipping.

²⁴ Guide to AQIS Forms for Vessel Clearance, Department of Agriculture, Fisheries and Forestry Australia, available at www.aqis.gov.au/shipping.

²⁵ Quarantine and Export Services: Border Quarantine- Seaports Program at www.affa.gov.au/content/output.cfm?ObjectID.

²⁶ Australian Ballast Water Management Requirements, Department of Agriculture, Fisheries and Forestry Australia, available at www.aqis.gov.au/shipping.

impact on the environment in a Commonwealth marine area.²⁷ The EPBC Administrative Guidelines on Significance provide that an action will require approval from the Environment Minister if the action is taken in a Commonwealth marine area and the action has, will have, or is likely to have a significant effect on the environment or the action is taken outside a Commonwealth marine area and the action has, will have, or is likely to have a significant effect on the environment in a Commonwealth marine area. According to the Administrative Guidelines, an action has, will have or is likely to have a significant impact on the environment in a Commonwealth marine area if it does, will, or is likely to result in a known or potential pest species becoming established in the Commonwealth marine area.²⁸

At the same time, however, an Appendix to the Administrative Guidelines on Sectoral information states that ballast water operations from vessels in Australian waters undertaken in accordance with an approved Commonwealth Government arrangement for the management of ballast water are not likely to have a significant impact on the Commonwealth marine environment.

Section 301A of the EPBC Act also makes provisions for the making of regulations to control non-native species. The regulations are to provide for the creation and maintenance of a list of non-native species, whose members do or have the potential to threaten biodiversity in the Australian jurisdiction. The scope of section 310A is limited to regulating or prohibiting:

- the bringing into Australia of species mentioned on the list;
- trade in members of a species on the list within Australia and between Australia and another country; and
- actions which involve members of species contained in the list so as to comply with international obligations undertaken by Australia.

Section 301A of the EPBC Act also allows regulations to be made for the establishment and implementation of plans to reduce, eliminate or prevent the impacts of members of species in the list on biodiversity in the Australian jurisdiction.

The EPBC Act could be used to regulate ballast water if the Administrative Guidelines under the Act were changed such that ballast water operations affecting the Commonwealth Marine Environment were made a matter of national environmental significance. This would make ballast water operations affecting the Commonwealth marine area subject to Commonwealth approval. Presently, however, the scope of s301A of the EPBC Act with regard to the making of regulations does not appear to be adequate to provide the basis for a single national ballast water regime. It is doubtful if regulations under s301A of the EPBC Act can extend to a single national ballast water regime. For one thing, the Act applies, by and large, to “Commonwealth marine areas”, which exclude the coastal waters of the States and the Northern Territory. For another, Environment Australia’s powers under s301A appear to be limited to the regulation of non-native species and cannot extend to the regulation of ballast water, which may not carry any species at all.

²⁷ *Environment Protection and Biodiversity Act 1999* (Cth), Part 3, Division 1, Subdivision F.

²⁸ *Environment Protection and Biodiversity Act 1999*,(Cth), Administrative Guidelines.

States/Northern Territory Framework

New South Wales

The New South Wales *Fisheries Management Act* 1994 (NSW) provides under Part 3 Division 2 the declaration of certain aquatic species, flora or fauna, as noxious.²⁹ Possession, release and transportation of such species is an offence,³⁰ and this provision could be directed to exotic species that may become a pest if introduced into New South Wales waters. Of the species currently listed, most notable is the black striped mussel, which was responsible for the recent infestation in Darwin Harbour.³¹ However, in its present form the legislation could not accommodate a system of regular inspection, because to enter a vessel suspected of having noxious fish aboard requires a search warrant.³²

Similarly, the *Marine Pollution Act* 1987 (NSW) is not designed to address introduced marine pests in ballast. Leaving aside the issue as to whether the presence of marine organisms in ballast water can be described as pollution, the provisions apply to oily mixtures, which can only include contaminants in ballast water, which are liquid.³³ As such, the presence of introduced marine pests could not be dealt with effectively under the present regime. This is emphasised by the fact the *Marine Pollution Act* 1987 (NSW) is principally directed at breach of its provisions, which would be of little utility in dealing with a marine pest infestation.³⁴ New South Wales authorities are of the view that the *Marine Pollution Act* is simply an enactment to implement the provisions of the MARPOL Convention and not a statute that deals with water pollution *per se*. Accordingly, it is the view of New South Wales officials that the provisions of the *Marine Pollution Act* would have no application to the present situation. This conclusion seems reasonable in the circumstances.

Some assistance might be drawn from the *Protection of the Environment Operations Act* 1997 (NSW). This legislation provides for a range of broad environmental protection measures. Part 5.3 deals with water pollution, and under section 120 there is a prohibition upon a person polluting waters. The definition of water pollution is very wide in the Act, and might conceivably be adapted to include the release of introduced marine pests through ballast.³⁵ Despite this wide definition, it doubtful whether the ballast water problem can be categorised as “pollution”. The difficulties in the application of anti-pollution legislation to this situation have already been discussed, even if the definition of water pollution could include the introduction of marine pests.

²⁹ Section 209 *Fisheries Management Act* 1994 (NSW).

³⁰ Section 211 *Fisheries Management Act* 1994 (NSW).

³¹ Regulation 229 *Fisheries Management (General) Regulations* 1995 (NSW). Other species include tilapia, Pacific oyster, and caulerpa taxifolia.

³² Section 214 *Fisheries Management Act* 1994 (NSW).

³³ Section 18 *Marine Pollution Act* 1987 (NSW).

³⁴ While section 24(c) of the *Ports Corporatisation and Waterways Management Act* 1995 (NSW) does give the relevant Minister the power to deal with the protection of the environment, this is “within the meaning of the *Marine Pollution Act* 1987”, which for the reasons considered above is of limited utility.

³⁵ Water Pollution is defined in the *Dictionary of the Protection of the Environment Operations Act* 1997 (NSW) as: “(a) placing in or on, or otherwise introducing into or onto, waters (whether through an act or omission) any matter, whether solid, liquid or gaseous, so that the physical, chemical or biological condition of the waters is changed,”

Northern Territory

The Northern Territory is the only secondary jurisdiction which has made a direct legislative response to the problem of introduced marine pests. The Northern Territory has extant statutory provisions to deal with a system of inspection and regulation. Section 29 of the *Fisheries Act* (NT) gives the relevant Minister extremely wide powers to deal with introduced marine species. Fisheries officers are authorised to stop, question and examine vessels to ensure they are in compliance with Northern Territory law (s30). Schedule 4 of the *Fisheries Regulations* provides that the black striped mussel is a noxious fish species, and Part 3 Division 2 of the same Regulations makes it an offence to have in one's possession, or to transport noxious fish. In addition, there are powers of inspection applicable to vessels under s.139 of the *Marine Act* 1995 (NT), but these are of limited utility in dealing with other vessels. Section 139 applies only to vessels licensed for commercial operations (Part V-Licensing of Certain Commercial Operations).³⁶

Queensland

The *Transport Operations (Marine Pollution) Act* 1995 (Qld) makes provisions for dealing with contaminated ballast water. However these provisions are not directed at regulating introduced marine pests. Part V of the Act, while permitting a definition of pollution that can include ballast water, ultimately limits the application of the operative provisions to mixtures containing "listed noxious liquid substances."³⁷ This would seem to exclude the application of the Act to marine organisms in ballast water.

Like most of the other States, Queensland possesses fisheries legislation designed to address the control of "noxious fish."³⁸ There are limitations to this legislation that make it inapplicable in its present form to be used as the basis of a system of regular inspection. Possession and transport of noxious fish are prohibited and introduced marine species are declared as noxious.³⁹ The legislation makes the transport of introduced marine species to Queensland an offence;⁴⁰ however, there are no provisions allowing mandatory entry to vessels for the purpose of inspection. Although a fisheries agency can direct a fisheries officer to take action to destroy noxious fish,⁴¹ it is difficult to see how this might be applied to inspection where there is no evidence that noxious fish exist.

In Queensland under the *Environmental Protection Act* 1994 (Qld), a general duty exists to do all that is practicable to prevent environmental harm.⁴² While the Act provides for the establishment of environmental protection policies to assist in this providing greater scope in the application of these duties⁴³, no policies in respect of the release of introduced marine pests from ships presently exists.

³⁶ Currently only one vessel, the Cullen Bay to Mandorah Ferry, is licensed under this section.

³⁷ Section 33 *Transport Operations (Marine Pollution) Act* 1995 (Qld).

³⁸ Section 89 *Fisheries Act* 1994 (Qld) makes it an offence to unlawfully to bring a noxious fish into Queensland. Similarly, the unlawful release of noxious fish is also an offence: section 90 *Fisheries Act* 1994 (Qld).

³⁹ There are no noxious species presently listed in Queensland: Schedule 9 *Fisheries Regulation* 1995 (Qld).

⁴⁰ Section 89 *Fisheries Act* 1994 (Qld).

⁴¹ Section 108 *Fisheries Act* 1994 (Qld).

⁴² Section 36(1) *Environmental Protection Act* 1994 (Qld).

⁴³ Section 24 *Environmental Protection Act* 1994 (Qld).

South Australia

South Australia possesses a number of pieces of legislation directed at water quality and environmental protection. The *Pollution of Waters by Oil and Noxious Substances Act 1987 (SA)* from its title suggests that it may be of relevance to marine pests, but this is not the case. The Act is limited in its application to oil pollution, and oily and other liquid discharges contained in, among other things, ballast water.⁴⁴ Accordingly, it is of no assistance in the present case. Similarly, the *Protection of Marine Waters (Prevention of Pollution from Ships) Act 1987 (SA)* is also directed towards pollution prevention. Marine pests in contaminated ballast water would have to be classified as a “noxious liquid substance” under the Act for it to have application.⁴⁵ Further, these measures are largely reactive, which, for the reasons outlined above, are of little utility in this context. The same problem is faced under the *Environmental Protection (Sea Dumping) Act 1984 (SA)*, which is directed at the conscious dumping of extraneous matter at sea, not the conducting of ordinary ship operations such as the exchange of ballast water. A general duty exists not to undertake activities which are harmful to the environment generally, with adaptation this may assist in combating introduced marine pests.⁴⁶

The *Environmental Protection Act 1993 (SA)* is not applicable to the regulation of IMPs. Section 64A is directed at making the release of a pollutant from a vessel an offence, and section 64B allows the relevant Minister to take precautions to prevent the release of pollution. While potentially adaptable to a scheme of management and inspection for introduced marine pests, it would require clarification that the release of contaminated ballast water was pollution.

South Australia also has legislation directed towards the quarantine of noxious flora and fauna. Like other States, it possesses noxious fish legislation. Sections 50 and 51 of the *Fisheries Act 1982 (SA)* provide for the designation of certain species as noxious, and remedial action taken. It may also be possible to adapt the *Noxious Insects Act 1934 (SA)* and the *Seeds Act 1979 (SA)*, to deal with the prevention of the entry of exotic marine pests. This adaptation, however, would be far from the original purpose of the Acts and is not likely to yield satisfactory results.

South Australia does have some regulations directed at the efficient and safe operation of its ports, which could be adapted to dealing with introduced marine pests and ballast water. The *Harbors and Navigation Regulations 1994 (SA)*⁴⁷ and the *South Australian Ports Corporation Regulations 1994 (SA)*⁴⁸ each provide that authorised officers can give directions to vessels with respect to ballast water. These relate to the physical dealing with ballast water by the ship, and do not of themselves give a right to inspect the vessel to determine if the ship’s ballast water may contain introduced marine pests.

⁴⁴ Section 14, 15 and 16 *Pollution of Waters by Oil and Noxious Substances Act 1987 (SA)*.

⁴⁵ Section 15 *Protection of Marine Waters (Prevention of Pollution from Ships) Act 1987 (SA)*.

⁴⁶ Sections 25, 79 and 80 *Environmental Protection Act 1993 (SA)*.

⁴⁷ Regulation 173 *Harbors and Navigation Regulations 1994 (SA)*.

⁴⁸ Regulation 41 *South Australian Ports Corporation Regulations 1994 (SA)*.

Tasmania

The *Living Marine Resources Management Act* 1995 (Tas) provides for the proclamation of certain aquatic species as noxious fish under Division 5.⁴⁹ These provisions, like those of other States make it an offence to bring such species into Tasmania, and to permit their release into Tasmanian waters.⁵⁰ However, in their present form these provisions could not be used as the basis of a system of regular inspection, as their operation is far too unwieldy. In order to have noxious fish destroyed, the Minister must notify an individual in writing that they should destroy such species in their possession. Only after failing to comply are fisheries officers permitted to enter premises, including vessels to effect that destruction.⁵¹

There are other provisions of little utility in the context of introduced marine pests. The *Pollution of Waters by Oil and Noxious Substances Act* 1987 (Tas) is limited in its application to mixtures which are oily, or are contaminated with a designated liquid contaminant, which would preclude its application to marine pests.⁵² Section 92 of the *Environmental Protection (Sea Dumping) Act* 1987 (Tas) does give officers wide powers of inspection and enforcement, and has a wide definition of pollution, yet that raises the vexed question of identifying the release of ballast water with pollution.

The *Marine and Safety Authority Act* 1997 (Tas) gives the Marine and Safety Authority certain powers to deal with environmental matters aboard ships in Tasmanian ports.⁵³ These matters can include dealings with ballast water, although there have not been regulations promulgated to establish a system of inspection and enforcement.

Victoria

Victorian fisheries legislation presently provides that certain aquatic species can be declared noxious,⁵⁴ and their possession or release into Victorian waters is an offence.⁵⁵ There are practical legal difficulties in applying this Act in a form that would permit a system of inspection. This is because under the legislation, the entry onto a vessel in relation to noxious species must be preceded by a request to the vessel's owner/master that the relevant aquatic life be destroyed.⁵⁶

Currently, the most useful legislative measure in Victoria is section 39 of the *Environmental Protection Act* 1970 (Vic) which deals with the pollution of waters. In sharp contrast to other States, the definition of pollution is sufficiently wide to include introduced marine pests. Indeed, at present Victoria is undertaking inspections of vessels, with the assistance of AQIS, which include the examination of ballast water, suggesting that the present legislative regime could accommodate a national set of standards directed at vessel inspection. Victoria is drafting an industrial waste management policy to address ballast water discharges of vessels. This draft policy would have status under Part III of the *EPA*.⁵⁷

⁴⁹ Section 127 *Living Marine Resources Management Act* 1995 (Tas).

⁵⁰ Section 129 *Living Marine Resources Management Act* 1995 (Tas).

⁵¹ Section 130 *Living Marine Resources Management Act* 1995 (Tas).

⁵² Divisions 1 and 2 *Pollution of Waters by Oil and Noxious Substances Act* 1987 (Tas).

⁵³ Section 6 *Marine and Safety Authority Act* 1997 (Tas).

⁵⁴ Section 75 *Fisheries Act* 1995 (Vic).

⁵⁵ Section 76 *Fisheries Act* 1995 (Vic).

⁵⁶ Section 85 *Fisheries Act* 1995 (Vic).

⁵⁷ Section 18B *Environment Protection Act* 1970 (Vic).

Western Australia

As with the majority of other jurisdictions, Western Australia possesses two legislative mechanisms that could be adapted for use in regulating and enforcing measures to combat introduced marine pests. The *Fisheries Resources Management Act 1994* (WA) provides for the declaration of certain aquatic species as “noxious fish,”⁵⁸ and makes it unlawful for an individual or body corporate to have, consign, keep or convey such species in Western Australia, or any designated part of Western Australia.⁵⁹ While fisheries officers have the right to request that any noxious fish are destroyed, and failing compliance can take action to have such species destroyed,⁶⁰ there does not appear to be an attendant right to arrange for inspection vessels to determine whether they may have noxious fish aboard. As with other States, the provisions appear to have been developed to combat the deliberate introduction of non-native fish species, not the incidental transportation of species on hulls or in ballast water. If these alterations were made it would also be necessary to authorise inspection of vessels in compliance with national standards would be necessary.

The other legislation in Western Australia that may be of relevance is the *Environmental Protection Act 1986* (WA). Under section 77 of the *EPA*, a person who is the owner of a vessel must ensure it complies with standards for the discharge into the atmosphere or waters of any matter. Failure to do so constitutes an offence, although there does not appear to be any right of automatic inspection of vessels to determine if they are compliant with the provision.⁶¹

While capable of adaptation, neither of these provisions are currently capable of supporting a standardised system of inspection of vessels to determine whether they may be carrying introduced marine pests. There might be some scope for utilising regulations made pursuant to the *Port Authorities Act 1999* (WA).⁶² Under these regulations, it is possible for the staff of the WA Port Authority to give directions to a ship’s master with respect to ballast water, including inspection, testing and treatment of ballast, and the discharge of ballast in designated areas. These provisions would seem to be capable of adaptation to deal with marine pests in ballast water.⁶³

Options for a National System

From the foregoing analysis it can be concluded that existing legislative mechanisms are not suited to the implementation of a single national ballast water management regime. We have seen that State and Northern Territory legislation is typically scattered through a range of Acts that are designed to deal with a wide variety of circumstances, and could not in its existing forms be easily adapted into a national system of reporting and inspection. Commonwealth legislation provides for a national system that appears to be operating in an efficient and effective manner, but is directed under the *Quarantine Act 1908* (Cth) at international vessels to Australian ports. As such, the creation of a truly national system will need to address domestic shipping, while at the same time incorporating existing arrangements for international shipping.

⁵⁸ Section 103 *Fisheries Resources Management Act 1994* (WA).

⁵⁹ Section 104 and 105 *Fisheries Resources Management Act 1994* (WA).

⁶⁰ Section 106 *Fisheries Resources Management Act 1994* (WA).

⁶¹ See section 89 *Environmental Protection Act 1986* (WA).

⁶² Section 139(2) and Schedule 7 *Port Authorities Act 1999* (WA).

⁶³ Regulations 17 and 18 *Port Authorities Regulations 2001* (WA).

None of the States or the Northern Territory currently has adequate administrative arrangements directed at inspecting vessels on inter-State voyages for the purpose of managing ballast water. In all the States and the Northern Territory administrative responsibility for introduced marine pests is split among different agencies.

State and Territory legislation directed at introduced marine pests is, with the exception of the Northern Territory, of a general nature, and not designed to specifically cope with the monitoring of vessels as part of a overall management scheme. The legislation typically falls into three categories: fisheries legislation, which may make the possession of certain marine species an offence by declaring them noxious; environmental protection legislation, which combats pollution; and, port authority legislation, designed to give State port officials powers to direct vessels in State harbours. In the first case, the legislation is generally poorly adapted to the purpose of regulating the discharge of ballast water as it was designed to combat the introduction of free-swimming species. In the second case, the efficacy of the legislation is largely contingent upon the release of pollution. The introduction of marine pests may be difficult to characterise as pollution in certain circumstances. For example, the presence of certain flora or fauna in ballast water may not be observable without scientific testing, and it would be difficult to justify the attraction of liability to a ship's master for releasing such waters. In the third case, while the legislation may be capable of being adapted to a scheme of inspection and enforcement, by and large this has not occurred.

In addition, most of the legislation is reactive rather than preventative in nature; that is, sanctions are applied in the event of breach, as opposed to inspection to ensure compliance. In the context of the release of marine pests, reactive measures are not effective. This is because it may be months or even years before the escape of such creatures is detected, by which time the offenders, who are unlikely to have been aware of their part in the release, will have long departed. Issues of proof make the establishment of responsibility in this case virtually impossible. Therefore, reactive legislation, such as anti-pollution legislation is of little utility in the present situation.

There are four possible legislative options for the creation of a comprehensive national ballast water inspection and enforcement regime:

1. The first is Commonwealth legislation and administration for international and domestic vessels, which would place full responsibility for the development and implementation of the ballast water scheme on the Commonwealth.

This option is not, however, very desirable because it runs counter to the shared responsibility expressly recommended by the SCC/SCFA Report. Instead of co-operating with the States/Northern Territory, it would bypass them altogether. If the legislation excluded the States from the field they then may wish to challenge the Commonwealth's assertion of rights and jurisdiction, which could initiate an expensive legal action.

2. The second option for a national regime is Commonwealth legislation and administration, and State administration where the administrative agreement is given force by State and Commonwealth legislation. Changes to the *Quarantine Act 1908* (Cth) would be necessary, with the States entering into Memoranda of Understanding (MOUs) to ensure the implementation and administration of the scheme. The States would be obliged with the Commonwealth to pass legislation formally adopting the MOU. While an MOU alone might raises issues

of enforceability in the event of a fall out between the parties, such issues would not arise if the MOU was supported by legislation.

The support of an MOU by legislation would not prevent the legislation itself from being amended or repealed. As such, State legislation giving supporting an MOU could be repealed by the State Parliament, and potentially destroying the efficacy of the MOU.

One method that might be available to combat this difficulty would be to have the Commonwealth pass its own legislation to support the MOU. Such legislation would be supported by the quarantine power under section 51(ix) of the Constitution, and possibly by section 51(xxxix) of the Constitution, the incidental power. Were such Commonwealth legislation to exist, it might effectively prevent a State unilaterally amending or repealing the State legislation supporting the MOU, by virtue of section 109 of the Constitution.

3. The third option for a national regime is Commonwealth legislation and administration for international ships, State/Territory legislation and administration for domestic vessels. This would require common legislation to be implemented by all State/Northern Territory governments to provide for a national system. It would mean that the existing Commonwealth arrangements for international vessels would be completely untouched. These arrangements, while relatively recent, appear to be operating effectively and in a cost neutral fashion.

Under this option, the States and the Northern Territory would have full legislative and administrative responsibility for domestic vessels. To achieve a national ballast water management system, this option would require the States and the Northern Territory to pass new and complimentary legislation to deal with marine pest inspections, and consequent enforcement. There would need to be both administrative and legislative coordination between the States/Northern Territory and the Commonwealth to ensure that the arrangements meet certain minimum standards. Penalties for breach, and restricted species and practices would, ideally, need to be regularised, requiring significant cooperation between the States/the Northern Territory and the Commonwealth, as custodian of the system for international shipping.

One advantage of this option is that responsibility for implementation of a national ballast management regime at the domestic level is devolved to the States, placing little additional responsibility on AQIS. The States would retain control over inspections of domestic vessels in their ports, without Federal intervention. This option is also consistent with the Offshore Constitutional Settlement.

The main problem posed by this option is that most of the States/Northern Territory would have to embark upon some legislative amendments, which means that the process would be slow, and potentially become deadlocked if they refused to participate, thereby undermining the effectiveness of a national system. Additionally, if a national scheme is sought, there would need to be regular consultation and identical legislative packages across eight jurisdictions. This may lead to difficulties in coordinating a nationally consistent and coherent response. There is also an increased risk of duplication of effort, as a result of there being eight agencies with regulatory responsibilities. Vessels on inter-state

voyages would also present difficulties for such an arrangement were legislation not consistent, or consistently applied across the country.

4. The fourth option for the regime is Commonwealth legislation and administration for international voyages, Commonwealth legislation and a mix of Commonwealth and State administration for domestic voyages. Under this option the Commonwealth would provide a single legislative structure for ballast water inspection and enforcement, while there would be cooperative administrative arrangements between the Commonwealth and the States/Northern Territory to provide for the administration of the system. There seem to be no Constitutional impediments to the Commonwealth and the States/Territory concluding cooperative arrangements to have responsibility for enforcement of the scheme shared between Commonwealth and State/Territory agencies.

This approach will remove the difficulties inherent in coordinating the legislation of eight different jurisdictions. It would expedite implementation of the new system, and mean the legislation could more readily adapt to face challenges from new pests or to reflect changes at the international level. The drawbacks of this option, however, are that it places responsibility upon AQIS as the lead agency to co-ordinate and manage the legislative package. The option also appears to be inconsistent with the shared division of responsibility between the Commonwealth and the States/Northern Territory under the Offshore Constitutional Settlement. The potential conflict with the terms of the Offshore Constitutional Settlement could, however, be removed if the States entered into MOUs with the Commonwealth.

Conclusion

The fourth option for Commonwealth legislation and administration for international voyages and Commonwealth legislation and a mix of Commonwealth and State administration for domestic voyages is the most preferable option. This option would expedite the implementation of a national system and remove the inconsistencies in the legislation and administration of eight different jurisdictions.

Constitutional Law Implications of Implementing a Single Ballast Water Management System

The implementation of any single national system of ballast water or hull marine pest inspection and enforcement must be accommodated within the legal system set out under the Australian Constitution. The Australian Constitution provides the basis for the division of legislative powers between the Commonwealth and State Parliaments. Not surprisingly, there is no direct reference in the Constitution to competence to legislate in respect of introduced marine pests or ballast water. However the Commonwealth Parliament has a number of heads of power that may be of direct assistance in giving it power to operate the inspection and enforcement of a single national ballast system. First and foremost of these is section 51(ix), the quarantine power.

Quarantine Power

The principal issue for the extension and reinforcement of the existing Commonwealth system of inspection and enforcement of ballast water is whether the quarantine power can accommodate matters pertaining to purely domestic quarantine. The *Quarantine Act 1908* (Cth) has traditionally been applied to international matters, and the States have each dealt with their own domestic quarantine measures. It does not follow, however, that section 51(ix) restricts the Commonwealth to legislative responses in respect of quarantine at an international level. Certainly this was not the opinion of Sir Robert Garran QC. In 1927, as Solicitor-General of the Commonwealth, he stated:

We have always taken the view that the Commonwealth can declare infected districts to be quarantine areas, to isolate them, and to treat patients and contacts in them. We can go further than that. If a disease – not an imported disease, but a local disease, for instance, a tropical complaint like the Queensland hook worm – shows serious signs of spreading to other parts of Australia, we have the power to draw a line, and to impose quarantine restrictions on that line. The same thing would happen with regard to tick in cattle. There is no doubt that quarantine must include plants, animals and everything else. In other words, we have taken the view that what are ordinarily known as quarantine measures – isolation, segregation, and disinfectionation – can be imposed not only on the outside borders of Australia, but between the States, and, without regard at all to State boundaries, across any part of the continent; any plague focus can be isolated.⁶⁴

The courts have had little opportunity to test Garran's assertion, although there is no reason to assume that the passage of time has rendered it invalid. On the contrary, if anything, the passage of time sees a more favourable outlook by the High Court on the extent of Commonwealth power today as compared to 1927 when Garran gave his opinion.

Constitutionally, the States possess the residual powers not exercised by the Commonwealth, and can legislate concurrently in most areas given explicitly to the Commonwealth. Thus, although the Commonwealth has power over quarantine by virtue of section 51(ix) of the Constitution, the States have themselves passed their own "quarantine" legislation, to attempt to restrict the spread of disease or noxious pests. This legislation is perfectly valid, but only to the extent it does not conflict with existing Commonwealth law, by virtue of section 109 of the Constitution. As such, the States could pass their own legislation pursuant to vessels calling at their ports, but this legislation could be rendered invalid if the Commonwealth wished to assert its authority in an area which is clearly a quarantine matter. The States would certainly be aware of this, and therefore traditionally have been willing to enter into cooperative arrangements with the Commonwealth, as they recognise the alternative is complete displacement.

Trade and Commerce Power

The quarantine power is not the only head of power available to the Commonwealth to deal with introduced marine pests. Section 51(i) of the Constitution, the trade and commerce power, may also be used to justify a national system of inspection and

⁶⁴ Evidence given before the Royal Commission on the Constitution of the Commonwealth, 1927. Quoted in S. Clegg, "Who is to Work the Pump? The Legal and Constitutional Issues for an Australian Single National Management Regime for Ballast Water" *Paper presented to the Workshop on a Single National Management Regime for Ballast Water*, 15 September 1999, pp.6-7.

enforcement. Section 51(i) gives the Commonwealth the power to regulate trade and commerce between the States. This has been generously interpreted in a number of cases to include regulation of the mode by which this trade can take place.⁶⁵ As such, all voyages of Australian vessels from ports in one State to a port in another State would be able to be regulated by the Commonwealth.

This would seem to exclude intra-State voyages, which would potentially undermine the application of a national system, but that does not have to be so. The majority of voyages, out of one potential source of quarantine to another area by Australian flagged commercial vessels are interstate voyages. An analogy here can be drawn to regulation of the airline industry. The Commonwealth can validly regulate interstate air transport using section 51(i) of the Constitution, because a flight from Sydney to Melbourne clearly relates to trade and commerce between the States. However, the Commonwealth statutory authorities regulating air transport bodies and their legislation apply to all air transport, including intrastate journeys. The High Court sanctioned this extension of Commonwealth power in a series of cases beginning in the 1930s, on the basis that the effective regulation of interstate journeys would be substantially undermined if the Commonwealth could not regulate all intrastate journeys as well.⁶⁶ Air traffic control could not safely be divided between the Commonwealth and the States, so therefore the Commonwealth ought to receive responsibility for all.

A similar argument could be made in respect of ballast water inspection and enforcement. If within a State there is the potential for the spread of marine pests from one area of the State to another that would substantially undermine any attempt by the Commonwealth to prevent the spread of such pests by the means of international or interstate travel. Accordingly, section 51(i) could be used as the basis of legislative action to implement a national ballast water management scheme.

Logically however, there would be limits on such an approach. It would be difficult to argue, for example, that the Commonwealth ought to be able to maintain an inspection system that would include Sydney ferries, or charter vessels making day trips on the Great Barrier Reef. This is because these vessels would not leave the same locality, and would therefore not be in a situation to spread any contamination. That said, there would be little reason to wish to extend the system of inspection and enforcement to such vessels, and the legislative package could be structured in such a way to operate only on vessels travelling beyond certain areas or distances, and those equipped to carry ballast water.

External Affairs Power

The external affairs power, section 51(xxix), may also be of assistance in providing a legislative basis for the implementation of a system of inspection and enforcement of a single national ballast water regime. The external affairs power can be used to give effect to treaties, it can also be used for other means that may be of relevance here. All vessels calling at any Australian port, whether they are making an intrastate, interstate or international voyage will almost certainly leave Australia's internal waters at some

⁶⁵ For example: *Murphyores Pty Ltd v Commonwealth* (1976) 136 CLR 1; *Fairfax v Commissioner of Taxation* (1965) 114 CLR 1. See generally P. Hanks, *Constitutional Law in Australia* (Sydney: Butterworths, 1996) pp.341-351.

⁶⁶ *R v Burgess; ex parte Henry* (1936) 55 CLR 608 esp at 629 per Latham CJ, 671 per Dixon J and 677 per Evatt and McTiernan JJ; *Airlines of NSW Pty Ltd v New South Wales (No.2)* (1965) 113 CLR 54.

point. In the *Seas and Submerged Lands Case*,⁶⁷ the High Court held that any point seaward of the low water mark was geographically external to Australia, and was not a part of any State. In *Polyukovich v Commonwealth*,⁶⁸ it was held by the High Court that section 51(xxix) permitted the Commonwealth Parliament to make laws concerning any matter geographically external to Australia. Commonwealth law could therefore be applied to vessels in the territorial sea to implement a single national system of inspection and enforcement of ballast water.

Implications of Section 92 of Constitution

One matter relevant to the Commonwealth, and particularly the States, is the impact of section 92 of the Constitution. This section provides that trade, commerce and intercourse between the States shall be absolutely free. While this provision does not prevent the imposition of quarantine measures between the States, it does limit the ability of a State, or the Commonwealth, to impose such measures. Measures must be directed solely for non-discriminatory purposes, and this will be assessed by the High Court in terms of the practical effect of the legislation, rather than its form. This was explicitly established by the High Court in *Cole v Whitfield*,⁶⁹ which upheld the validity of Tasmanian conservation measures, which prevented the importation of interstate crayfish. On this basis, any measure directed at instituting an inspection and enforcement system for ballast water must do so in a fashion that can be objectively shown to be both necessary to effectively prevent the spread of contamination, and to be applied in an otherwise non-discriminatory way. The measures presently contained in the *Quarantine Act* 1908 (Cth), if implemented to all voyages, would seem not to fall foul of section 92, as it would appear they are directed for a legitimate end, in a non-discriminatory fashion.

The Offshore Constitutional Settlement Considerations

The Offshore Constitutional Settlement (OCS) is an important issue to consider in any attempt to introduce a single national regime for ballast water, as the OCS sets out the scope and responsibility of the States with respect to Australia's maritime zones.

Under the OCS, the States possess the offshore jurisdiction they possessed in 1900, immediately before Federation, and a belt of territorial sea three nautical miles in width beyond these waters. Prior to 1900, the States possessed jurisdiction only over what common law may be described as internal waters, and the low water mark marked their boundaries in other cases.⁷⁰ These internal waters were largely restricted to rivers, bays and ports, although for the most part they were never precisely defined. The courts have periodically been obliged to consider the status of certain waters, and the rules for their identification are relatively clear.⁷¹ It seems likely that all Australian ports presently used by commercial vessels may be regarded as internal waters. Even if this were not the case, the territorial nexus between the State and a vessel anchored

⁶⁷ *New South Wales v Commonwealth* (1975) 135 CLR 337.

⁶⁸ (1991) 172 CLR 501.

⁶⁹ (1988) 165 CLR 360.

⁷⁰ *New South Wales v Commonwealth (Seas and Submerged Lands Case)* (1975) 135 CLR 337.

⁷¹ For example see *Raptis v South Australia* (1977) 138 CLR 346; *Ferguson v Union Steamship Company of New Zealand* (1968) 42 ALJR 33; *Yarmirr v Northern Territory* (1998) 156 ALR 370; *Kirmani v Captain Cook Cruises Pty Ltd* (No.1) (1985) 39 ALR 417.

immediately offshore would be overwhelming, and clearly make the vessel subject to the State's jurisdiction.

Under the OCS, the States received jurisdiction to three nautical miles. This means that a State would have the power to make laws with respect to activities concerning a ship's ballasting in waters within three nautical miles of the coast or in any port within the State. However, in the waters outside the three nautical miles the States and the Northern Territory would not necessarily possess the jurisdiction to regulate those activities. Jurisdiction would have to be based upon the connection between the State and the activity regulated. Cases in this area provide limited assistance. However to illustrate by example, it might be difficult for South Australia to assert jurisdiction over the ballast water activities of a vessel eighty miles due south of Mount Gambier, proceeding from Hobart to Fremantle without stopping at any South Australian port. Consequently, throwing a dominant role upon the States in regulating domestic shipping might mean there are gaps in the effectiveness of the scheme.

While the OCS gives a State jurisdiction to three nautical miles, it does not preclude the Commonwealth from legislating over activities taking place offshore, including within State waters. Commonwealth powers in this respect are plenary, subject to Constitutional restrictions.⁷² This would mean that there was no impediment upon the Commonwealth authorising State officials to apply its laws in areas outside the State's jurisdiction. This already occurs in Commonwealth legislation, pursuant to the OCS, with the authorisation of State officials, and State control over certain fisheries beyond 3 nautical miles from the coast.⁷³

Conclusion

The current Commonwealth, State and Northern Territory legislative and administrative framework for managing IMP incursions is inadequate because there are a number of gaps in the implementation of the framework between the States, the Northern Territory and the Commonwealth. The jurisdictional boundaries between the States and Territories and the Commonwealth is especially problematic in this area because marine pests pay no heed to administrative boundaries; often crossing these boundaries and becoming pests in many jurisdictions. Thus even if one State or the Commonwealth has a strong framework to prevent the introduction of marine pests through ballast water, the waters of that State can still be invaded by marine pests that originated in another jurisdiction where the ballast water framework is less stringent. A single national ballast water management scheme would remove jurisdictional inconsistencies and would allow for a single, uniform approach to the prevention of the introduction of invasive marine pests in ballast water.

The development of a national ballast water management scheme would require considerable consultation between the Commonwealth, the States and the Northern Territory and is not something that can be implemented in the short term. Nevertheless, a national scheme of laws that would provide and maintain a consistent standard for ballast water management throughout Australia should be developed.

⁷²*Polyukhovich v Commonwealth* (1991) 172 CLR 501. None of the restrictions appear to be relevant in the present circumstances.

⁷³*Port McDonnell Professional Fishermen's Association v South Australia* (1989) 63 ALJR 671.